No. 14590

# United States
# COURT OF APPEALS
## for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN, husband and wife,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

(AND RELATED CASES)

## APPELLANTS' REPLY BRIEF

*On Appeal from the United States District Court for the District of Oregon.*


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## SUBJECT INDEX

## TABLE OF AUTHORITIES CITED

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### STATEMENT

We are appalled at being met with so many misstatements, contradictions and unfounded conclusions based on a Pre-trial Order that is not subject to dispute which we have met with during this proceeding. Now we are met in the opening statement of the Appellee's brief with the most glaring, most amazing and yet somewhat enlightning misstatement of all.

To properly understand this we should give the Court a little of the background. There are only two distircts actually involved in this proceeding, Peninsula District No. 1 and Peninsula District No. 2. So many references are made to these two districts that both sides have fallen into the habit of referring to them as District No. 1 and District No. 2, without using the prefix "Peninsula". There is a third district, however, that has been mentioned incidentally which is known as Multnomah District No. 1. These three districts adjoin. Peninsula District No. 1 is on the west with Denver Avenue embankment as its eastern boundary. Peninsula District No. 2 is east of the Denver Avenue embankment with that embankment as its western boundary. Multnomah District No. 1 immediately joins Peninsula District No. 2 on the east, upstream, and has no connection with Peninsula District No. 1.

At the bottom of page 6 of the Appellee's statement of the case, counsel refer to the parenthetical statement made by Phillip Dater, the engineer at the time of the original organization of Peninsula District No. 2, to the effect that Denver Avenue embankment would have no water against it and, therefore, not act as a dike so long as there was no breaking of the fills or levees surrounding Peninsula District No. 1. This was a perfectly obvious statement which wouldn't require an engineer to see and has no bearing whatsoever on the case. Immediately following this at the top of page 7 counsel for Appellee make the following statement:

> "In March, 1928, the supervisors of District No. 2 proposed and the Multnomah County Court ap-

> proved an amendment to the plan of reclamation for the district (Exs. 72, 73, 74). The petition notes the elevation of the Denver Avenue fill at 33 feet m.s.l., *the elevation of the levees of District No. 1 at 32 feet,* calls attention to the fact that the levees of District No. 2 had been constructed only to 28 feet (Ex. 72, pp. 2-3) and proposes that these levees be raised to 33 feet (Ex. 72, p. 5). This work was apparently done as proposed (R. 18) and later, as has been noted, the levees were once more rebuilt by the Corps of Engineers (R. 19-22). Neither the district nor the Corps did any work on the Denver Avenue fill (R. 18-22)." (Emphasis ours)

This is a most glaring misstatement of the facts because it is a misstatement as to the wording of an instrument that was quoted verbatim in the pre-trial order. This appears in the printed record on page 26. The actual wording of this insofar as it is necessary to disclose the question is as follows:

> "The D e r b y Street approach to the Interstate Bridge, by which Peninsula Drainage District Number Two is now bounded and enclosed on the west, was constructed by the County of Multnomah to an elevation of thirty-three feet at the crown. The dikes and levees constructed by and enclosing *Multnomah Drainage District Number One* of Multnomah County, Oregon, situated immediately to the east of Peninsula Drainage District Number Two, are all constructed to an elevation of thirty-two feet at the top. Your petitioners have been informed by the engineer for Peninsula Drainage District Number Two that the dikes and levees enclosing said Peninsula Drainage District Number Two should all be constructed to an elevation of thirty-three feet; * * * " (Emphasis ours)

This quotation is from the re-organization plan dated March, 1928, the entire petition being placed in the

file as Exhibit No. 72. Exhibit no. 73 referred to by Appellee was the order of the Probate Court dated May 19, 1928 confirming and approving the amended plan of re-organization. Exhibit No. 74 was the assessment of property in Drainage District No. 2 dated August 22, 1928 for the purpose of carrying out the plan. None of these exhibits are printed in the record but are in the file. There is no language in either of these exhibits contrary to the provision just above quoted.

Apparently the Appellee's counsel have concluded from this re-organization plan that it referred to Peninsula District No. 1 on the west instead of Multnomah District No. 1 on the east and that by this re-organization plan, Peninsula District No. 2 adopted the dikes surrounding Peninsula District No. 1 as its western protection and that by doing so, the Denver Avenue embankment, which divided the two districts, became merely a mound carrying a highway through the center which was actually one drainage district, and was not looked upon further as any protection against floods.

The Appellants, theory of this is that the fact that in this re-organization plan, Peninsula District No. 2 did not refer in any way whatsoever to Peninsula District No. 1 nor to any dikes surrounding it, shows conclusively that Peninsula District No. 2 had no confidence whatever in the dikes surrounding Peninsula District No. 1 and the railroad fills. The fact that this re-organization plan was followed immediately by the elimination of the joint pumping plant which had theretofore been operated by Peninsula District No. 1 and Peninsula District

No. 2, the culvert under the Denver Avenue embankment which was used for that jont pumping plant was immediately plugged and Peninsula District No. 2 put in its own pumping plant pumping the surplus water over its own dike into the Columbia slough, and the further fact that they assessed the landowner in Peninsula District No. 2 for the purpose of bringing its dikes up to the equivalent of the Denver Avenue embankment, confirms the Appellants' theory.

This statement on the part of the Appellee is amazing for the reason that the same theory and same statement was made by counsel for Appellees in their brief in the lower court. The Appellants in their reply brief called attention to this misstatement of the facts. Then realizing that this confusion was entirely possible because of the reference to District No. 1, the Appellants in their brief in referring to the same re-organization plan, on page 7, made this parenthetical statement

> "Not to be confused with Peninsula Drainage District No. 1 to the west."

Apparently we did not succeed in correcting the thinking of counsel for Appellee. It is inconceivable, and we do not believe that counsel for Appellee have made this misstatement of fact for the purpose of misleading the Court, but it does seem clear that they have succeeded in misleading themselves. This time we wish to call the Court's attention to this misstatement with sufficient certainty that this Court cannot be confused by this contention on the part of the Appellee and this misstatement of fact.

In the opening paragraph above we remarked that this statement was somewhat enlightening. It is somewhat enlightening for the reason that it would appear that the lower court was actually misled, the same as counsel for Appellee. If the Appellee's brief is read and the opinion of the Court below is read, with the assumption that both the Court and counsel for Appellee succeeded in misleading themselves by this misconception of the fact, then many of the statements made by the Court below as well as the statements and contentions of the counsel for Appellee become more understandable. The Appellee in its brief repeats and repeats this misstatement and refers to it in advancing their theories until it seems to the Appellants that their entire theory of the case and entire defense is based upon this misstatement and this misconception of the facts.

There are other discoloring statements of fact in the Appellee's statement which for the most part seem to be a repeat of the statements set forth in the findings of fact. Since these have been answered rather fully in Appellants' brief we feel it is unnecessary to call further attention to them at this time.

The actual situation which we believe is revealed from the entire evidence in this case is that the Kaiser Company simply rode rough shod over everybody. They acquired a mile square of land in Peninsula Drainage District No. 1 which was swampland and had not been developed, lying behind railroad fills of uncertain quality over which the Peninsula District No. 1 had no control. There was no showing that there was any engineer's

report obtained as to the safety of building the housing project in that area. Then they started cutting an underpass through Denver Avenue ten days before a permit was obtained subjecting the people and the property which had been highly developed in Peninsula District No. 2 to the hazard of the uncertain railroad fills to the west of Peninsula Drainage District No. 1. They made no showing that other access and exit roads could not be developed without destroying this embankment which was obviously used for the protection of District No. 2. They had constructive notice by the recording of the deeds that the landowners in District No. 2 had an easement on the Denver Avenue embankment and the title to the property was taken by the United States subject to this easement. They gave no notice to anyone nor opportunity to object or take any action to prevent the construction of this underpass. They built the ring levee for their own protection only and obtained no engineer's report or advice as to the construction thereof. The entire project was developed by Mr. Kaiser and he carried on without regard to the safety of the peoole, or their properties, or the safety of children gathered in the grade school, or the consequences of the hazards which were being developed. The Appellee followed his lead, permitted the destruction of private property rights and paid the bill for doing so. The Kaiser Company was clearly the agent of the United States.

## ARGUMENT

### No. 1. Reply to Appellee's argument Item No. 1 to the effect that Denver Avenue was always a highway and not a levee.

In the argument on this point Appellee again, on page 22, refers to the reorganization and reiterates the same misstatement as is pointed out in our statement. Here Appellee quotes two sentences from this short paragraph in this reorganization plan but fails to quote the sentence that refers to Mutnomah District No. 1. They seem content with their own statement as to that, in the following words:

> "and the construction of the levees in District No. 1 to an elevation of 32 feet."

If it were not so inconceivable, one might readily conclude that by quoting sentences from this short paragraph in this reorganization plan without quoting the material one showing the reference was to Multnomah District No. 1 and not to Peninsula District No. 1 was a deliberate attempt to confuse the Court. If that was done it would explode the Appellee's entire argument.

In this section of Appellee's brief, Appellee refers to the provisions in the deed to Multnomah County whereby the grantor, Peninsula Industrial Company, reserved unto itself the right to construct crossings over, under and across this right of way and to do other things which they interpret as showing that it was never intended to use this embankment as a dike. The Court will recognize that this deed was excellently drawn. The circumstances

at the time was that Peninsula Industrial Company, an industrial company, owned this body of land making up Peninsula Districts Nos. 1 and 2, covering a considerable acreage, in close proximity to Portland. At that stage of undevelopment this Company was undoubtedly uncertain as to what form of future development this property would take. They might desire to put in crossings, either railway or water crossings, might desire to develop part of it as industrial, thereby requiring crossings, or they might desire to develop it as suburban property for industrial and home purposes in which event dikes would be required, and this was the manner in which it was ultimately developed. The Court will recognize that these were rights that were reserved to the grantor only and not to the grantee. They could exercise these rights or not as they might desire in the future. The record shows that they did not desire to use any of these rights but instead organized drainage districts on either side of Denver Avenue, which required maintenance of this embankment. If they had desired to make it into one district and not to consider Denver Avenue embankment, they would have organized it as one district. They would not have organized it as two districts. They would not have organized District No. 1 adopting this embankment as its eastern boundary and District No. 2 adopting Denver Avenue as its western boundary. They could just as well have organized the entire thing into one District and disregarded Denver Avenue Embankment if that was their intention. Our position is, and we do not believe authorities are necessary to be cited, that when they join with other property owners who had become

owners of part of the land at the time of the organization of the Districts, they could not after that exercise any of these rights to cut waterways or crossings through this embankment which they adopted as their western protection. Neither could any other successor in interest exercise any such rights unless perhaps they owned the entire District.

Counsel further argues that the County did not construct this embankment as a levee nor agree to maintain it as a levee for flood protection. There is no contention on the part of the Appellant that there was any agreement on the part of the County or the State Highway Commission to construct this as a levee or to maintain it as a levee or to guarantee the District against floods. The contention of the Appellants, and it is so clear in the deeds, that what the County agreed to do, and the State Highway Commission agreed to do when they took this highway over, was to maintain an embankment across this property that was equal to the bridge approach. The grantor and its successors in interest had the right to hook on to this embankment and use it for any purpose they saw fit so long as it did not interfere with the highway over the top. If this embankment had washed out after they carried out their agreement to so construct it, it is not contended that the landowners of District No. 2 would have any right of action against the County or Highway Commission for failure to protect them against floods. They were only required to maintain an embankment equal to the bridge approach. The facts show that they agreed to maintain such an embankment. By referring to Item No. 4 of the Appellants' brief, it will be

readily seen how well they did comply with this agreement. The embankment was built in the identical manner and with identical material as used in the construction of the outside dikes and it was built to a size of more than three times the size and strength of the strongest of the outside dikes. In other words it was a monster compared to the outside dikes. The residents and landowners in District No. 2 were perfectly safe in relying upon this embankment which they had the right to use as flood protection. This embankment did withstand the flood and no water would have entered into District No. 2 except for the underpass which was built through it in violation of the easement which the Government recognized when they procured the title by condemnation proceedings to the land immediately adjoining the underpass on the east. The provision in the deed that the County would maintain a public highway *over* this embankment did of itself guarantee that the embankment would always be maintained equivalent to the bridge approach and would be the best possible dike protection that the owners of land in District No. 2 could possibly provide. We fail to see where the Appellee can get any comfort out of the provisions of this deed. In our humble opinion it was a most excellently drawn instrument and fully provided for the use of the embankment by the grantors and their successors in interest in any manner in which they desired to develop their property.

Neither can we see how they can get any comfort in the proposition that the State Highway Department did not agree to protect this embankment as a levee or

guarantee District No. 2 against floods. The Appellants would have been perfectly satisfied had they maintained the embankment equal to the bridge approach and equal to the strength to which it was built. There is no suggestion in any of the proceedings, in the deed or otherwise that would authorize or justify the destruction of this embankment by the construction of an underpass by the Highway Commission, or by anyone else except by the original grantor prior to the organization of Peninsula District No. 2.

**No. 2. Appellants' reply to Item No. 2 of Appellee's brief contending that the construction of the underpass was lawful and proper.**

Here again counsel for Appellee seem to be laboring under the idea developed from their mental confusion that Denver Avenue embankment was abandoned by Peninsula Districts No. 1 and No. 2 by the reorganization of Peninsula District No. 2, leaving the embankment as merely an embankment carrying a highway through the center of one District.

Appellee maintains that this was for public highway purposes and cite the statutes of the State of Oregon and many authorities holding that the Highway Commission has control over its highways. They seem to maintain that since the Highway Commission had this control over the highway it had the right to authorize the construction of this underpass. We find no dispute to make with the statutes nor with any of the authorities cited by Appellee except that none of them apply to

the situation in this case. No authority is cited and of course none could be found to the effect that because there is a highway under the control of the Commission that they can appropriate and destroy the rights of individuals without either buying or condemning those rights.

In this case over two-thirds of this highway fill belonged to individual ownership. The Highway Commission had only an easement to maintain a fill for the purpose of supporting its highway over the top of the fill. The Highway Commission and the County of Multnomah recognized the easement of the landowners in accepting the deed from the Peninsula Industrial Company. The United States Government recognized the easement in condemning the property on the east side of the fill by condemning it subject to the District's easement. This is as much a property right as if they owned the entire fee and the County and the State had no rights over it whatsoever. No authorities would seem to be necessary to the effect that this easement could not be appropriated by the Highway Commission or anyone else except by either buying or condemning that easement.

The Highway Department maintains another highway known as Marine Drive running over the outside dike along the Columbia River. If Appellee's contentions are sound, that because they own the highway they can do anything with the fill they desire, then, without any action whatsoever, without consent from the District or any landowners, the Highway Depart-

ment could cut underpasses or destroy the outside dike protecting Peninsula District No. 2 along the Columbia River.

One of the other contentions is that this underpass was for public safety and was constructed for proper highway purposes. No one can read the permit which was issued by the State Highway Commission without being sure that this was nothing but a private way for ingress and egress to and from the government's housing project for temporary purposes only. They contend that it was to be maintained by the Highway Commission but the permit shows that it was maintained by them during the period of war only and then at the expense of the government. This does not place it as a public highway. Under this permit the maintenance of this underpass after the war seems to be nobody's business. It is certainly not a public highway.

**No. 3. Appellants' reply to Item 3 of Appellee's brief contending that even though the underpass had been unlawful, no rights of Appellants would have been violated.**

To begin with, let us point out again that on page 34 the Appellee refers to the reorganization plan and recites that the proceedings carefully distinguish between Denver Avenue and the District levees. They seem to still be laboring under their mental confusion that the reorganization plan had something to do with the levees in Peninsula District No. 1. This mental confusion seems to underlie every argument presented by the Ap-

pellee. In this argument they repeat also another contention that has continuously been made, time and time again by the Appellee, that the Appellants in this case, none of them, ever owned any part of the right of way. That is any part of the fee title to the embankment by which the highway was supported, and therefore never had any rights in it. We have never been able to understand quite Appellee's continuous contentions to this effect. The fee simple to all but the center 80 feet of the Denver Avenue embankment belonged to the adjoining owners in the beginning and always since. Apparently the Appellee takes the position that since the government condemned the property immediately adjoining the embankment where the underpass was constructed, no one of the Appellants had any interest therein. We have pointed out and it seems perfectly obvious to counsel for Appellants that when this property in Peninsula District No. 2 was put into a drainage district, every property owner in that District has the right to have this embankment maintained. It was their western border, it was their western protection, has always been referred to as such, and it has always been so used and it is perfectly obvious to anyone on the ground.

As was said in the case of U. S. vs. Florea, 68 Fed. Sup. 367, at page 374, "neither private individuals nor government agents could escape notice of the fact that these lands would be of no value without diking protection."

Following this the Appellee makes the contention that the Appellants are not shown to be successors in

interest to the Peninsula Industrial Company and cite the fact that some 46 individuals joined in the organization of Peninsula District No. 2. It is true that there were 46 different individuals and corporations joining in this original organization which makes it all the more obvious that Peninsula Industrial Company itself could not after that date destroy the Denver Avenue embankment since that embankment was adopted as the western border and protection for the drainage district. After that the Peninsula Industrial Company would have no more authority to cut this embankment than any other owner in the District. This would apply to the United States Government the same as any other owner of property within the borders of District No. 2. The mere fact that the government obtained the title to the ground immediately adjoining the underpass gave it no more rights than any other individual landowner in the District.

Appellee contends that since there was forty-six different owners of land in the District when it was organized that they cannot be successors to Peninsula Industrial Company. This can hardly be contended seriously because the original deed was given in 1915 and District No. 2 was organized approximately 2½ years later in 1917. There were 2½ years during which these forty-six owners could and probably did obtain titles to this land from Peninsula Industrial Company. In any event whether or not they acquired their title directly from Peninsula Industrial Company they joined in the organization of the District which gave the entire District all the rights in the Denver Avenue embankment

that was owned and controlled by Peninsula Industrial Company.

Appellee also contends that there is no showing of land ownership or the succession from Peninsula Industrial Company. It will be remembered, however, that it is stipulated in the Pre-trial Order that these Appellants were all owners of land within the District. Neither the titles, therefore, nor the damages to their lands were necessary elements in this proceeding wherein we are trying only the question as to whether the United States Government was liable for the damages resulting from flood. If the decision of this Court were to be, (which we do not believe can happen) that the Appellants must be successors in interest to Peninsula Industrial Company, then that will be a question to be determined upon a hearing as to the damages in the event the lower court is reversed as to its ruling on the liability of the United States Government. If we were suing the County and Highway Commission for breach of contract this question might become pertinent but not in this case.

Appellee next in this same item in its argument goes into the question of whether this provision in the agreement was a covenant or a condition subsequent. This same question was raised by counsel for Appellee in the lower court but since the Court did not find in their favor and no cross-appeal was taken, it would seem that the question should be settled. However, let us briefly go into the subject. There is no rule laid down by the Oregon Supreme Court better known nor more universally followed nor more frequently cited than the

rule laid down by Justice Wolverton in the case of Arment v. Yamhill County, 43 Pac. 653, 28 Or. 474, in which the Court said:

> "But like all other contracts in writing, this must be construed by taking it at the four corners and looking through the whole instrument from the identical standpoint of the contracting parties when it was entered into, and that construction must be given it, if possible, which will give effect to all its parts and carry out the obvious intention of the parties, and which will make the contract legal, rather than one that will render it void. Hildebrand v. Bloodsworth, 12 Or. 80, 6 Pac. 233; 2 Pars. Cont. 500, 505."

Now taking this deed and applying this rule of interpretation, there can be no possible construction given to it than that it constituted a contract between the county and its successors and Peninsula Industrial Company and its successors whereby the County agreed for itself and its successors to construct within three years an embankment equal to the bridge approach and thereafter maintain it. This contract cannot be avoided regardless of any other wording in it to hold this agreement void. Counsel cite a good many cases in the construction of conditions subsequent and contend that since the obligation of the grantee under the deed is stated as a condition subsequent and not as a covenant the only remedy is the right of re-entry. Then they quote from 26 C.J.S. 473 to the effect that if the language imparts a condition merely and there are no words imparting an agreement, it is not enforceable as a covenant.

Taking this authority they have cited, we find the following statements under subdivision E, Sec. 141, page 472:

> "As shown in Covenants § 1 b, whether a particular provision is a condition or covenant depends on the intention of the parties. The question is a matter of construction. Covenants and conditions may be created by the same words, but forfeitures are not favored. Courts are therefore more favorably inclined to holding that the language used constitutes a covenant rather than a condition which will forfeit the grant. This rule is especially applicable where the words used are in the form of a covenant pure and simple, and there are no words of proviso, or condition, or provision for reentry in the deed."

We could quote the entire article cited by Appellee but we fail to see where the Appellee could get any comfort out of any of the statements therein contained. There can be no question but what this must be construed as a covenant that must be performed by the county and its successor, the Highway Commission.

The other authorities cited by the Appellee on this question would only have an academic value, if any, as none of them apply to the facts in the case. The only way the Appellee attempts to avoid the legal results of what took place is by attempting to avoid the facts as set out in the Pre-trial Order and not subject to dispute. On page 33 of this item in the Appellee's brief, they set out Statute 123 OCLA 216 (4 ORS 551.140) which refers to the Realignment of Dikes which the Appellants rely upon and which provides that where any owner of any portion of the diking district has a dike running over its land and it desires to realign the dikes, it must

substitute equal protection therefor. Appellee contends that this only applies where the diking district owns the land. Therefore, it couldn't apply. This section, however, does not so provide. It provides:

> "The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

As we read this section, it provides that a new dike should have been substituted and the district given an easement to the same extent as it had on the Denver Avenue embankment. The Appellee denies that there is such an easement but it seems to us that it is undisputable, it is set out in no uncertain terms in the deed of conveyance and is not subject to any other interpretation. The Appellee answers the question why the Court below did not refer to this statute in the following language:

> "As Appellants point out, the court below did not comment on this statute—for the very good reason, no doubt, that it seems self-evident the statute has nothing to do with this case."

This is a novel argument indeed. It is only understandable by remembering that counsel for Appellee had a mental confusion as already pointed out to the effect that the re-organization plan of Peninsula District No. 2 adopted the levees of Peninsula District No. 1 and abandoned the rights and claims in Denver Avenue em-

bankment so it would be left merely as a mound with a roadway thereover running through the two districts, Peninsula Drainage District Nos. 1 and 2, through the center thereof. This statement on the part of the Appellee to the effect that this statute was not mentioned because it had nothing to do with this case is immediately followed and apparently based upon their oft-repeated contention that when District No. 2 was reorganized it adopted the dikes of Peninsula District No. 1 as its western protection which imaginary fact exists only in the mentally confused idea of counsel for Appellee.

**No. 4. Appellants' reply to Item No. 4 in Appellee's argument to the effect that Denver Avenue was not constructed or maintained by the United States or its employees.**

If we understand the Appellee's argument in this section of their brief, it is to the effect that the only one that caused any damage was the one who manipulated the spade in taking out the fill and whoever he was he was not an employee of the United States. As we get their theory it is that the United States would not be liable because it did not manipulate the spade. For this you must look to the contractor. The contractor would not be liable because he was only carrying out his contract in fulfilling the obligations imposed upon him by the Government's contract and likewise he did not handle the spade. The superintendent and foreman in turn would not be liable because likewise they

were only carrying out their duties and were not permitted by the unions to handle tools. So the only one under this theory as we can determine would be the lowly workman who actually handled the spade. No negligence could be attached to him because he was merely carrying out his duties and you couldn't say that there was a negligent act. The act was a wrongful one in the first instance when the Government undertook to build an underpass. The Kaiser Company, Inc., representing the United States, executed the contract with the Tower Sales & Erecting Company to build this underpass for the United States (Exhibit No. 8, R. 259).

The District Court disposed of this argument on the part of the Government in no uncertain terms and no cross-appeal has been taken from that decision. We call the Court's attention to the District Court's opinion on page 135 of the record wherein the Court said:

> "But, it is said, the Court is bound by its previous decisions, the principles of which fix liability here on the United States. It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages. Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute. Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name. Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government officer or agent. * * * "

Also we call the Court's attention to the note number 17 beginning at the bottom of page 135 of the record which reads as follows:

> "This implication seems to arise from the language of the Court in the case of Dalehite vs. United States, 346 U. S. 15, 44-45, where it is said: 'It is to be invoked only on a "negligent or wrongful act or omission" of an employee. * * * But the statute requires a negligent act.' These two sentences are diametrically inconsistent. For the purpose of clarity, it is noted that, in the instant case, this Court, in finding no liability here does not rely upon the fact that the individual agents of the government are not named or designated. The statute says, 'The United States shall be liable, respecting tort claims, in the same manner and to the same extent as a private individual under like circumstances.' If, under the law of the state, a private individual could be held for release of waters over the land of another, the United States can be also. Inaccurately labeling the state doctrine as one invoking 'liability without fault' by arbitrary fiat determines there can be no fault except negligence. Here this Court only holds that a private person would not be liable under the exact circumstances."

**No. 5. Appellants' reply to Item 5 of Appellee's brief to the effect that there was no negligence or wrongful conduct in connection with the construction and maintenace of ring levee.**

A reading of this section of the Appellee's brief indicates very clearly that counsel are basing it upon their confused idea that when Peninsula District No. 2 filed its re-organization plan it referred to and adopted the dikes of Peninsula District No. 1 and thereafter the

Denver Avenue embankment was abandoned and became nothing but a mound running through the center of one levee district. We have already pointed out the fallacies of this presumption.

Its counsel argue that the failure of the railway fill was unforeseeable (which is not the fact). Then they argue that in the absence of any reason to anticipate the failure of the railway fill due care and good engineering practice did not require the construction of the ring levee or any secondary levee at the site of the underpass. They argue that the ring levee was only constructed to guard against overtopping of the District No. 2 levees to the east and no protection was required from the west (This statement is likewise fallacious as it has been shown that the Denver Avenue embankment had been lowered at one point to the same height as the dikes surrounding District No. 2).

From these facts they argue that there was no reason for building a ring levy to protect the underpass. Now if their assumption of the facts were not so fallacious there might be some excuse for them not building any ring dike at all at the site of the underpass as in such event Denver Avenue embankment had no part in the situation. As we have tried so strenuously to point out, however, ever since this case started, the Denver Avenue embankment was adopted as the western border of Peninsula District No. 2. It was a primary dike and the only dike that Peninsula District No. 2 had or relied upon. It was not a secondary dike. It may be referred to as a secondary protection as to that section that lies

between the north and south dikes of Peninsula District No. 1 for the reason that as quoted in the pre-trial order, there would be no water against that portion of the embankment so long as there was no failure of the dikes or fills surrounding Peninsula District No. 1. Nevertheless, it was Peninsula No. 2's primary dike and that dike was wrongfully destroyed by the Appellee. This required, under the statutes of the State of Oregon and under the laws of the State of Oregon, as has been pointed out in the Appellants' brief, that the one so destroying it had the duty to protect it with an embankment equal in strength to the one removed. It will be noticed that if the Appellee had proceeded in the way provided by the statute and procured a court order permitting the removal of this embankment and had substituted protection equal in strength to the satisfaction of the superintendent of the district, then there would be no further obligation on the part of the Appellee, whether or not it be washed out by flood. Since, however, they did not procure this order and permission to remove this dike but removed it upon their own account, without any authority, then it seems to the Appellants that it becomes an absolute duty upon the Appellee to protect Peninsula District No. 2 against flood waters flowing through the underpass. In other words, they become practically guarantors that the ring levee be sufficient to protect Peninsula District No. 2. The same theory applies to the County and the Highway Commission. So long as they maintained the Denver Avenue embankment equivalent to the bridge approach under the very clear terms of their contract, they did

not guarantee that it was sufficient to withstand flood waters nor would they be liable should it fail to hold. When, however, they remove that embankment, without authority, then they too become guarantors of the efficacy of the ring levee.

Now applying these facts, which are undisputable, then the arguments set forth in this Item 5 of their brief become meaningless.

There is one more contention on the part of the Appellee in this section to which we wish to call the Court's attention. They refer here, as they have frequently, to their testimony to the effect that the Corps of Engineers of the United States does not build secondary levees. The argument seems to be that Denver Avenue embankment was a secondary levee and, therefore, should have no money spent on it. In answer to this we wish to call the Court's attention to the fact that Peninsula District No. 2 provided for this Denver Avenue embankment for its western and primary dike whether or not it be considered as secondary protection for a certain section of it. The Government's own expert witness, Mr. Turnbull, after much hedging, testified (R. 243-244) that they should not take out a secondary dike which was already there. It follows from this that even if this section of Denver Avenue embankment be considered a secondary protection it was unsound and negligent to take it out. This is particularly true in this case when the history of the Columbia River is read with its annual floods and the completion or flood report of Government engineer D[illegible]blee is read in which he recommends many

things to protect all dikes, primary and secondary, to protect against these expectant floods, and particularly recommends that the Denver Avenue underpass be eliminated.

As to there being no wrongful or negligent conduct on the part of the Appellee, we believe the facts so thoroughly establish that fact that little additional argument is required. We do, however, wish to call the Court's attention to the case of House v. Los Angeles Flood Control District, 25 Cal. 384, 153 Pac. (2d) 950. This case is peculiarly identical with the instant case. In that case the Court at page 950 of the Pacific Reporter says:

> "In the present case the defendant district may not escape liability on any theory of exercising a riparian right, for the plaintiff does not correlate her damage claim with any such principle. Rather she makes the direct charge that the defendant district removed a safe and secure protection to her land immediately adjacent thereto and substituted therefor an unsafe, careless and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property, which had theretofore never been visited by the river waters. It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the *unnecessary* damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property owner as the result of a public improvement undertaken in the exercise of the police power must have

> some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not needlessly inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage." (Emphasis ours)

Counsel for Appellee do not seem to recognize that acts of omission are negligent the same as acts of commission. Where there is a duty on the part of a defendant the failure to perform that duty constitutes negligence the same as a faulty compliance with such duty. This rule is recognized in the State of Oregon in the case of Rice v. City of Portland, 7 Pac. (2d) 989, as well as many other cases, and is recognized by all of the authorities. We do not believe it necessary to cite numerous cases on principles so well established.

Still one more item referred to in this section of the Appellee's brief we feel should be again called to the attention of the Court. On page 45 they make the statement that from the point of view of structural stability of the ring levee the Government experts testified it was in every way comparable in strength to the Denver Avenue fill. The Government's expert witness, Mr. Turnbull, revealed in his testimony (R. 242) that he was basing this comparison of the ring levee with the point

in Denver Avenue where the old five foot culvert had been constructed which had started to wash on the apparent presumption that if nothing was done with this five foot culvert the highway embankment would have been washed out at that point. Otherwise these expert witnesses' testimony were meaningless. It has been shown in the pre-trial order and pointed out in Appellants' brief, that the Denver Avenue embankment was over three times the size of the ring levee and that it was built in the identical manner as the outside dikes. Whereas the ring levee was built entirely differently and was built as a one-way dike, that is it was built to protect against water coming from the east only with no intention to protect against water from the west and it had no value for such protection. We have also pointed out in our brief and it is shown in the pre-trial order that this little five foot culvert, originally used for a joint pumping plant, was only five feet in width whereas the ring levy was 800 feet. Also the culvert was plugged under the supervision of government engineers. All experts testified that that could be done. No doubt Peninsula District No. 2 anticipated that if any emergency arose this little five foot culvert could be plugged at any time to stop any flood. That their anticipation was correct is shown very clearly by the flood or completion report filed by Government engineer Diblee. His report was that while this culvert did start to break it was stopped in a very few hours at a time when the flood waters were lapping at the top of the Denver Avenue embankment. It is a matter of common knowledge that during any flood it is always anticipated that

there may be weak spots develop in the best of the dikes. For this reason every available man is called out during the flood fight and these small weak spots are controlled. In this case there was no such possibility with the 800 foot ring levee built for one way protection only.

We also wish to call the Court's attention to the fact that Section 1346 (2b) of Title 28, U.S.C.A. provides that the District Court shall have jurisdiction of claims for damages against the United States "caused by the negligent or wrongful act or *omission* of any employee of the Government. * * *" In this case we have not only the wrongful act in the first instance of the destruction of Denver Avenue embankment, but we have the "omission" from the fact that the Government failed to substitute equal protection thereafter and this failure was continuous from the time of the original destruction of the embankment to the date of the flood.

**No. 6. Appellants' reply to Appellee's argument No. 6 to the effect that the levee was not built or maintained by the United States or its employees.**

In this argument the Appellee maintains again that since the United States didn't remove the dirt, didn't manipulate the spade in removing the dirt by its own hands they were not responsible and that the employees of the Portland Housing Authority were not employees of the United States Government. There might be some force to this argument if this was a case where some employee of the Portland Housing Authority was in an

automobile accident and negligently caused damage to a third party, but we cannot see how it can have any bearing upon this case. In this section of the argument they refer to Appendix A of their brief wherein they have set out some sixteen pages of citations, decisions and statutes, Congressional proceedings, Senatorial speeches and what not to prove that employees of PHA were not employees of the United States.

In this case as we see it, it would make no difference whether FPHA leased this housing project to PHA or to anyone else. The evidence clearly shows that FPHA retained complete control and while the employees were paid from collections by PHA it was paid by monies belonging to FPHA. If there was any money left it went to FPHA.

It is particularly shown in this case that FPHA retained complete control of the project and particularly of the ring levee. Mr. Donovan C. Byers, the engineer for PHA, in his deposition (R. 359-364) and Mr. Clinton S. McGill (R. 192-193), the maintenance engineer for PHA, both testified to the effect that the ring dike was not a proper protection and that they procured the advice of government engineers, prepared plans for bringing the ring dike up to standard and submitted the plans to FPHA in Seattle, the cost thereof to be $8,000.00 or $9,000.00. They both testified that Mr. A. A. Pearson, the reginal engineer of FPHA, visited Portland thereafter and they were told that they had exceeded their authority and their plans were rejected. They were instructed to prepare plans for filling the cracks and making some

repairs and according to Mr. McGill's testimony (R. 102), the only repairs made were that these cracks were dumped full of dirt and raked over so they wouldn't constitute a hazard to anybody that walked around the top of the dike. This shows, we contend, that no matter what the purpose of FPHA and even if it had been let out under the same circumstances to any third party, FPHA still would control. And the negligence in maintaining the ring dike that was not sufficient to fulfill the duty owed to District No. 2 was the negligence of FPHA.

At any rate, the District Court settled this very effectively in Clark v. United States, 109 Fed. Supp. 213, wherein the Court said at page 223:

> "However, there is no doubt that Federal Public Housing Administration had complete control of the Vanport operation and had authoritarian domination over the acts and conduct of all employees on that government owned housing establishment from Project Manager to janitor. A series of the now familiar executive directives controlled in the most meticulous manner the minute detail of financial ownership, operative and mangerial functions. Furthermore, by a series of paternalistic pronouncements, the lives, recreation, health and public relations of the tenants were controlled from the central agency in Washington.
>
> "The fact that the Authority was a federal agency is demonstrated by recent decisions. With reference to the management of Vanport, there is little question that the entity was acting as an agency of the United States, as the Oregon statute empowered it to do. * * * "

We respectfully submit that the reasons for making FPHA chargeable for the neglect of duty in this case is

a great deal stronger by reason of the circumstances set forth than was true in the Vanport cases above quoted from.

**No. 7. Appellants' reply to Item No. 7 of Appellee's brief to the effect that the United States was not obligated to provide flood protection to Appellants.**

In this section of the Appellee's brief they obviously are still going on the fallacious theory that Peninsula District No. 2 in its re-organization adopted the levees and dikes and fills of Peninsula No. 1 and thereafter relied on them completely, and Denver Avenue embankment became merely a mound with a highway running over it. It could only be on such a theory that the Appellee could contend that the United States had no obligation to provide protection against the underpass.

In this section of their brief they take the position that the Government was one of many owners of parcels of land within Peninsula District No. 2. That it had the right to do anything they liked for their own protection and had no obligation whatsoever to any other landowner in the district. Their theory seems to be that any one landowner can cut the dikes subjecting the entire district to floods and it is up to each individual owner of property to protect himself against their wrongful act.

We wish to call the Court's attention to the very well considered case of United States v. Florea, 68 Fed. Supp. 367. At page 371, beginning in the middle of paragraph number 2, the Court said:

> " * * * But it will be clear that the levying of of assessments in a Drainage District, particularly one which has erected dikes for flood protection, is a property right which belongs to the aggregate of the owners within the boundaries and is simply entrusted to the District in order to permit collections and payments to be made under authority of the state. The public interest in reclamation and protection against flooding of agricultural land dictates this solution."

Again, beginning at the bottom of page 376 the Court says:

> "The situation of the Drainage District may be conceived of as the same as a company formed for such purposes by private coveant except that the District is a public corporation. The combined owners represented by the District must maintain the ditches, dikes and pumps, and furnish this service to the government. The government by taking the land took the benefit of these services and must pay therefor. So far, the United States has only proposed to pay for the fee simple title without the appurtenant easements."

It will be remembered that the United States took this land adjoining the underpass by eminent domaine, subject to the easement of the drainage district. Now they seem to maintain that they can destroy this easement subjecting all of the other landowners in the district to the hazard of flood without assuming the responsibility therefor.

On page 52 the Appellee argues that the Appellants could probably have obtained permission from the Highway Commission to install a stop-log structure in the underpass or from the Housing Authority to strengthen

the ring levee itself if they desired to do so. Also that they were in a position to build such levees as they thought appropriate on their own property or on land east of the ring levee.

This appears to us to be a strange argument. In the first place, the Highway Commission did not own the underpass. It is shown that this underpass was a private way maintained by FPHA. In the second place what stop-log could be placed therein except by filling that underpass and rebuilding the embankment. What possibility could the other owners of the district have to obtain such a permit when that would in turn destroy the roadway through the underpass. As to building a new dike east of the Government's property, this would have necessitated cutting Peninsula District No. 2 in two. The Government in condemning the property along the underpass took 136 acres. So to build a new dike surrounding this would have meant the necessity of cutting off all of this property and subjecting the owners of the balance of the district to the expense of building an entirely new dike for its western protection and eliminating the western portion cutoff by the condemnation proceedings of the United States from contributing to the expense thereof. Following their theory further then, anyone located east of this new dike could in turn cut the same and subject still a smaller portion of the drainage district to the expense of building still a third dike and so on. If such theory were correct there would be little use for the formation of diking or irrigation districts and the vast amount of land that has been salvaged by such districts would be worthless.

**No. 8. Appellants' reply to Item No. 8 of Appellee's brief in which they maintain that these cases relate to discretionary activity as to which there can be no liability under the Tort Claims Act.**

As we undlerstand the Appellee's contention, it is to the effect that wherever judgment is required for performance of any act then the Government is not responsible. If we follow this theory as they now contend, then it would seem there never would be occasion wherein the Government could be held liable for damages. No act so far as we know and certainly no construction is ever undertaken without the exercise of some judgment on the part of someone. The contention seems to be that since this is true then the United States may undertake anything it desires and since it requires the exercise of judgment, the United States cannot be held responsible. The District Court settled this question, we believe, accurately and in no uncertain terms. No cross-appeal has been taken by the Appellee and we believe this should dispose of this question. The Court in its opinion, beginning on page 136 of the record says:

> " * * * The exercise of administrative discretion as a result of 'policy judgment and discretion' may free the government from liability in handling explosives necessary for national defense in time of war. But the application of such a principle here or in the cases just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong."

Also in the note numbered 20 at the bottom of page 136 where the Court says:

> "Justice Jackson, dissenting in Dalehite vs. United States, 346 U. S. 15, p. 60, expresses a fear that the interpretation therein of the Tort Claims Act merely amends the ancient adage to read, 'The King can do only little wrongs.' "

We submit that no case has been cited by Appellee and none can be wherein the Government can be relieved of liabilty under this provision for the commitment of a wrongful act for which there was no necessity.

**No. 9. Appellants' reply to Appellee's contention No. 9 to the effect that these claims are barred by 33 U.S.C.A. 72 (c).**

In this section the Appllee contends that so far as Government aid is concerned Peninsula District No. 1 is identical with Peninsula District No. 2 where Vanport was located. This section again demonstrates very clearly that they are basing their argument on the fallacious understanding that there is no difference between Peninsula District No. 1 and Peninsula District No. 2. In this case no Government aid was ever given for the construction of Denver Avenue embankment. They were not working upon it at the time and the flood was not occasioned by any acts of the Government in attempting to save Peninsula District No. 2 from flooding. In the Vanport cases the entire question was as to the breaking of the railway fill over which the Government had no control. During the flood fight they were working upon that fill and, as we understand that case, the plaintiffs were contending that the Government owed a duty to protect that fill. The District Court and this

Court properly held in our opinion that the act referred to by the Appellee relieved the Government from any claim for flood damage. These cases, however, are based upon an entirely different statement of facts. That the Government completely destroyed the embankment which the Peninsula District No. 2 had for its protection and it owed a duty to protect Peninsula District No. 2 by an embankment equivalent thereto and failing to do so it becomes liable for damages for this negligent omission.

In reading this argument of Appellee's counsel, we feel convinced that counsel for Appellee not only misled themselves but the District Court as well, by their theory that Peninsula District No. 2 in its reorganization plan was referring to and adopting the levees and fills surrounding Peninsula District No. 1 as its western protection. There was no reference or mention whatsoever in that proceeding as to Peninsula District No. 1 and only incidental mentioning of Multnomah District No. 1 lying to the east. Based upon this fallacy counsel for Appellee, as well as, in our opinion, the District Court was applying this provision to the breaking of the railway fills to the west and not applying it to the Denver Avenue embankment. We are convinced that the Court below was laboring under this fallacious understanding for the further reason that in determining the issues the Court below found that the breaking of the Denver Avenue embankment was the cause of the flooding of Peninsula District No. 2 lying behind the Denver Avenue embankment. We are unable to reconcile these findings except upon the theory counsel for Appellee, and the

District Court as well, were misled by this misunderstanding. Again we do not believe that this was an intentional misleading of the Court below any more than the repeated reference to this reorganization plan is intended to mislead this Court. However, counsel for Appellee have very obviously misled themselves into this fallacious position and innocently misled the District Court, so we believe.

This section referred to was passed in connection with the Government's work in aid of diking districts along the Mississippi. The Courts have held and we do not dispute their holdings, that this applies to the Columbia River. The only decision, however, that has interpreted this clearly and reasonably and with accuracy insofar as the facts in this case are concerned was the holding of this Court in the Vanport cases. Clark v. United States, 218 Fed. (2d) 446. The finding of this court in that case was cited in the Appellants' brief. It is to the effect that when Congress undertook to provide for aid by the Federal Government of diking districts, it should do so on a non-liability basis for damages which might result from such aid. In the present case there was no aid being given by the Federal Government. The claims of the Appellants are based upon the wrongful act of FPHA in destroying the Denver Avenue embankment which Peninsula District No. 2 had the right to rely upon. If the Government cannot be held in a case of this nature then they could cut the dikes of any diking district at any time, any place, in connection with anything that would be undertaken by the Government upon the whim of any Government agent or employee.

Any contractor building a housing unit or doing other work for the Government could, upon his own notion, cut any dike and thereby destroy any amount of property without the Federal Government being responsible for it and being liable therefor. To so hold would be, as the District Court said, to return to the day when the Government can do no wrong.

**No. 10. Appellants' reply to Section No. 10 of Appellee's brief arguing to the effect that since the events of which the Appellants complain took place prior to January 1, 1945, the Court below had no jurisdiction to consider their claims.**

When this underpass was constructed in the latter part of 1942 and the early part of 1943, it was a wrongful act giving rise to a claim for damages therefor by those who were affected thereby against the government. The only difficulty was that the only way citizens at that time could obtain redress was to ask Congress for it. The statute passed on January 1, 1945, 28 U.S.C.A. 1346 (b) gave citizens the right to sue the Government for damages from a negligent act. It was a provision applying only to jurisdiction. This section provides as follows:

> "(b). Subject to the provisions of chapter 171 of this title. the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, *accruing* on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the *negligent or wrongful act or omission* of any employee of the Government while acting within the scope of his office or employment, under circum-

stances where the United Staes, if a private person, would be liable to the claimant in accordance with the law of the place where *the act or omission* occurred." (Emphasis ours)

We call the Court's attention to the fact that this authority applies to damages "accruing" after January 1, 1945 and not from the date of the commission of the wrongful act. Here no damages accrued until the flood in 1948. In 1942 and 1943 the landowners in Peninsula District No. 2 might have been able to enjoin the construction of this underpass had they been given the opportunity to do so but they would have had no right to sue for damages, and in fact no damages could have been proved at that time. The damages did not consist in the removal of the embankment. The damages resulted and accrued from District No. 2 being flooded through this underpass in 1948.

We wish to call the Court's attention to the statement of the law on this subject in 5 ALR (2d) 307. On page 310 the law is summarized as follows:

"In many jurisdictions a distinction has been made between an original ('Permanent') injury from structures 'necessarily injurious' and injuries, described interchangeably as 'temporary,' 'transient,' 'recurring' or 'consequential,' caused by structures 'not necessarily injurious,' to the effect that the completion of a structure of the former kind puts in motion the limitation period for the entire cause of action, comprising the whole damage, past, present, and prospective, while, as to injury caused by a structure of the latter kind, only actual harm to the owner's land caused by overflow can put the limitation period in motion. Other courts take the view that, irrespective of the nature of the injury,

a cause of action cannot accrue nor the limitation period commence to run before actual harm is inflicted to the plaintiff's land."

Also on page 311 is the following:

"As a practical matter, the owner of land has generally no chance whatsoever of successfully suing, let alone recovering a substantial amount in damages, before his land has been actually harmed by overflow, no matter how easy it is to say after the event that he should have foreseen it. It is therefore submitted that no general rule should be adopted which would impose upon him the unfair burden to sue at a time when as a matter of reality his chance of a fair recover is so slim and that, as a general proposition, his cause of action does not accrue, and the limitation period does not commence to run, before his land has been actually harmed by overflow."

A similar situation was before the Court in Atchison, T. & S. F. R. Co. v. Eldridge, 41 Okla. 463, 139 P. 254, where the Court said:

"It strikes us as unreasonable to argue that a cause of action is barred by limitation before it arises. The facts in the case at bar do not disclose that plaintiff ever sustained any damage prior to the overflow complained of, and if the embankment in question, be it ever so negligently constructed, had been maintained for a century, the plaintiff would have had no cause of action for damages sustained until they were sustained; hence his right of action necessarily dated from the date of his injuries:"

Since the statute provides that the District Court shall have jurisdiction for all damages "accruing" after January 1, 1945, and the authorities universally hold that no action for damages would lie similar to the instant case until the flood, there can be no question that

the Court had jurisdiction in this case. Appellee has quoted many cases. The only one, however, from which any quotation is taken is the case of Rankin v. De Bare, 271 P. 1050-1051. This is a case wherein the defendant built a building on his own property which encroached upon the plaintiff's property by one to two inches. This was a permanent structure and all the damage that resulted to the plaintiff resulted immediately upon its construction. The Court held properly in this case that his action started to run at the time the property was taken. Any different holding in this would have been unrealistic. It has, however, no bearing on the issues in this case. We find no case cited by the Appellee that would have any bearing on the situation as it exists here.

We call the Court's attention also to the fact that this legal point was settled by the District Court and no cross-appeal was taken therefrom by the Appellee.

**No. 11. Appellants' reply to Item No. 11 of Appellee's brief to the effect that the Appellants assumed the risk of flood loss.**

They contend that the immediate cause of damage to property lying east of Union Avenue was not the failure of the ring levee but the failure of Union Avenue fill.

Union Avenue is a street or highway running through the center of Peninsula District No. 2. It is built on an embankment because otherwise it would be continuously flooded. Union Avenue, however, had two culverts through it and an underpass (R. 56) (R. 454-455). Obviously it was not relied upon or considered as flood pro-

tection. The supervisors of Peninsula District No. 2 called attention to this in their resolution to the effect that Union Avenue was not relied upon as any flood protection (R. 342). Drainage District No. 2 neither had nor claimed any easement thereon. Appellee apparently tries to relieve itself of a portion of the damages resulting to Peninsula District No. 2 by this contention that Union Avenue was the protection afforded to that portion of Peninsula District No. 2 which lies east thereof. We see no merit whatsoever in this contention. No one in the district ever considered the Union Avenue fill as any protection. And it did not constitute any portion of the dikes surrounding the district. It is shown in the flood report that in an effort to mitigate the damages an attempt was made to plug the underpass thereunder and to also plug the culverts in an attempt to save the property east thereof from the damage resulting from the flood. This, however, proved impossible.

Appellee next contends in this same section that of the properties within Peninsula District No. 2 some of them were purchased and some improved after the construction of the underpass. They contend that those people assumed the risk. This is a strange theory. The law is, of course, that every parcel of land within a drainage district is entitled to the protection of the dikes and when they are destroyed improperly the one so destroying them is responsible for the damages and owes a duty to the entire district to protect it. If the Appellee's theory is correct then anyone can destroy a dike at any time, disregarding the protection which the properties within the district had and the one destroying the dike would

only be liable for the property as it was at that time, regardless of when the damages resulted and the cause of action accrued. The owner of property within a diking district has the right to improve and the right to sell. If the Appellee's theory is correct, however, this would prevent any improvements to property or any sale thereof after destroying of a dike as was done in this instance. Of course, that would be against public policy.

It is particularly true in this case, that no such theory could possibly lie for the reason that the Appellee did cause to be constructed a ring levee surrounding the underpass, which to the layman's eye, was sufficient protection but because of concealed defects gave them no protection whatsoever, thus lulling them into a sense of security. We call the Court's attention to the comparison of dikes set forth in Appellants' original brief, Item No. 4 of the argument.

**No. 12. Appellants' reply to Item No. 12 of Appellee's brief to the effect that nothing in Appellants' brief justifies a decision in their favor.**

So far as Appellants can see this is the only place in the Appellee's brief where they have attempted at all to support any of the findings in the case to which the Appellants so strenuously object, and in this section they only attempt to support the findings by repeating them. The Appellee had from February 22, the date of the opinion of the Court below, to September 14, the date of signing the findings, to draw the factual statements that would support the decree. Two attempts were made,

the file will show, which after objections were discarded. On the third attempt the findings were prepared, presented and signed as of the same day, September 14, 1954, giving no opportunity to object thereto. Now, it would appear that Appellee desires to make the fourth attempt to find some facts which would support the decree. The only thing they have added, or attempted to add, is their interpretation as to what happened on the reorganization of Peninsula District No. 2. As has been repeatedly pointed out this is a fallacious misleading statement based upon written and precise language. Apparently Appellee's brief in its entirety is based upon the theory that in this reorganization Peninsula District No. 2 referred to and adopted the levees and fills surrounding Peninsula District No. 1 as its western protection. Whereas in fact, no mention or reference whatsoever was made in that reorganization to Peninsula District No. 1 or to its levees or fills, the reference having been to Multnomah District No. 1 located to the east. The western protection referred to in that reorganization was clearly the Denver Avenue embankment and it was the desire of District No. 2 that its own outside dikes be brought up to the standard and height of that embankment so as to give the district the same protection from the north, south and east as it had on the west by this embankment.

## CONCLUSION

The predicament of the Appellee is quite obvious. Every legal principle involved was determined by the District Court in favor of the Appellants. There was no dispute in the evidence as to any material fact. When these legal principles are applied to the undisputed facts there is no possible leeway by which judgment could be rendered otherwise than for the Appellants. Yet the reverse was true. The effort on the part of Appellee seems to have been throughout the proceeding, and still is, to confuse the facts for the apparent purpose of finding some face-saving excuses for the agents and employees of the United States for subjecting the Government to the payment of damages on account of their negligent omission of their duties, and subjecting the residents and landowners of Peninsula District No. 2, their families, grade school and homes and industries to the horrible ravages of floods, while at the same time lulling them into a sense of security. Face saving excuses, however, even if they were justified from the undisputed facts, are not sufficient to relieve the government from liability for the damages resulting to those in Peninsula District No. 2.

Realizing that there is nothing in the undisputed statement of facts that could justify judgment for the Appellee, the Appellee has attacked in its brief and asked this Court to reverse the District Court as to the legal principles determined by it. They have cited in their brief 144 cases and 36 statutes and regulations in an

effort to reverse the District Court on legal principles announced by that Court and as to which no cross-appeal has been taken. We have considered all of these cases, statutes and regulations and we are unable to find one that applies to the situation in this case, when you acknowledge the true and undisputed statement of facts.

We respectfully submit that the District Court should be reversed and that these cases should be referred back to the District Court for determination of the damages suffered by each of the Plaintiffs and Appellants.

Respectfully submitted,

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